No. 06-1471

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In The

Supreme Court of the United States

DENNIS W. GAY, ET AL.,

Petitioners,

v.

SARAH MORGAN,

Respondent.

On A Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioners have presented compelling reasons to grant the Petition, where the Third Circuit's Opinion affirming the District Court's grant of a motion to remand does not conflict with a decision of this Court or another court of appeals, but, rather merely followed firmly established precedent in determining that Petitioners failed to meet their burden of demonstrating to a legal certainty that the amount in controversy exceeded the $5,000,000 statutory minimum amount in controversy under the Class Action Fairness Act of 2005 ("CAFA")?

2. Whether Petitioners have presented compelling reasons to grant the Petition where the Third Circuit's Opinion affirmed the District Court's factual findings that Petitioners failed to meet their burden of demonstrating to a legal certainty that the minimum amount in controversy for jurisdiction under CAFA was present, and where the Third Circuit concluded, as the District Court had, that no improper manipulation or abuse underlay Petitioner's permissible pleading of an amount in controversy below the jurisdictional minimum?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Sarah Morgan, on behalf of herself and all others similarly situated, respectfully requests that the Supreme Court deny the petition of Dennis W. Gay, et al. for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

Contrary to the statement of Petitioners, the opinion of the United States District Court for the District of New Jersey is reported at 2006 U.S. Dist. LEXIS 55211 (D.N.J., August 7, 2006).

JURISDICTION

There is no "case[] in the court[] of appeals to be reviewed by the Supreme Court" by petition for writ of certiorari in this action, as required by 28 U.S.C. § 1254. Petitioners never obtained a stay of the return of the case to state court pursuant to 28 U.S.C. § 1447(c). The case has been pending in state court since February 2007. There simply is nothing federal remaining to be reviewed, and therefore, Petitioners purported invocation of this Court's jurisdiction under 28 U.S.C. § 1254(1) is unavailing.

STATUTORY PROVISIONS INVOLVED

The Respondent accepts the Petitioner's statement of statutory provisions involved with the following exceptions. Title 28 U.S.C. § 1447(c) is reproduced at Resp. App. D at App. 7-App. 8.

STATEMENT OF THE CASE

A. INTRODUCTION

In a futile attempt to characterize this case as one presenting compelling reasons for this Court's review on a writ of certiorari, *see* Sup. Ct. Rule 10, Petitioners attempt to portray the Third Circuit's Opinion as in conflict with a decision of this Court, *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283 (1938); and as creating a split in the United States courts of appeals on an important federal issue. However, the Third Circuit followed *Red Cab,* and no such split of authority exists in reality.

The Third Circuit's application of a "legal certainty" test to the question whether the proponent of federal jurisdiction had demonstrated the presence of the minimum amount in controversy to sustain jurisdiction, followed a long line of settled Third Circuit precedent – it simply was not a new pronouncement of the Third Circuit that purportedly created a split of authority. Indeed, as to the precise issue determined below, that where a plaintiff pleads less than the jurisdictional minimum the proponent of federal jurisdiction must demonstrate to a "legal certainty" that the case is truly worth more, the only other court of appeals decisions have reached the same conclusion as the Third Circuit below. *Burns v. Windsor Ins. Co.,*

31 F.3d 1092 (11th Cir. 1994); *Lowdermilk v. United States Bank Nat'l Ass'n*, 479 F.3d 994 (9th Cir. 2007).

The purported "split of authority" Petitioners contrive is a complete fabrication. Petitioners stitch together a patchwork of cases (some pre- and some post-CAFA) from other courts of appeals, which are not germane to the instant matter. As discussed in detail below, the cases Petitioners cite that applied a "preponderance of evidence" standard, almost without exception, are cases in which the plaintiffs sought an indeterminate amount in damages and the courts had to weigh the evidence advanced by the removing party to determine if it had met its burden of demonstrating that the minimum amount in controversy was present.

The Third Circuit's long-standing application of the "legal certainty" test is consistent with Supreme Court precedent and with the fundamental legal principal that removal statutes are strictly construed with all doubts about the existence of removal jurisdiction to be resolved in favor of remand.

Petitioners attempt generally to cast this New Jersey class action as one in which they are being denied a federal forum to which they believe CAFA entitles them. However, CAFA did not federalize all class action litigation. Rather, Congress left to state courts jurisdiction over class actions where, for example, the class is comprised of under 100 members, 28 U.S.C. § 1332(d)(5)(B), the matter is a "home state" class action, 1332(d)(4)(A)(i)(I), or "local controversy" 28 U.S.C. § 1332(d)(4)(B), and actions such as this one where the amount in controversy does not exceed $5,000,000 in sum or value. 28 U.S.C. § 1332(d)(2).

Thus, the assertion that the Third Circuit's decision thwarts Congress' intent in passing CAFA is misplaced.

The balance of the Petition essentially complains that the Third Circuit's affirmance of the District Court's factual findings was erroneous. As such, the issues do not raise the kind of compelling questions required for review on a writ of certiorari. *See* Sup. Ct. Rule 10.

B. PROCEDURAL HISTORY OF THE CASE

Plaintiff, Sarah Morgan, filed this action on behalf of a class of similarly situated New Jersey citizens and residents who purchased Petitioner's $135 tube of purported miracle skin cream, StriVectin-SD, that is advertised to consumers as eliminating facial fine lines, wrinkles and blemishes, as well as bodily chicken pox scars and stretch marks. Pet. App. F at 50a-52a. In fact, StriVectin-SD is not scientifically proven to be able to make the bodily structural changes Petitioners claim. The action was filed on January 30, 2006 in New Jersey Superior Court, Monmouth County. Ms. Morgan sued under the New Jersey Consumer Fraud Act and under the New Jersey common law for fraud, unjust enrichment, breach of warranty and injunctive relief based on Petitioners fraudulent and deceptive advertising of the efficacy of StriVectin-SD. Pet. App. F at 52a, 68a-71a.

Ms. Morgan permissibly limited the damages she seeks to recover below the CAFA minimum jurisdictional threshold of $5,000,000. Pet. App. F at 52a-53a, 69a-74a. The complaint alleges "the plaintiff class does not seek and will not accept recovery the sum or value of which exceeds $5,000,000." *Id.* at 53a.

On March 22, 2006, Defendants removed this action, pursuant to the removal statute, 28 U.S.C. § 1441 and 1453, to the United States District Court for the District of New Jersey on the purported grounds of federal diversity jurisdiction under 28 U.S.C. § 1332. Ms. Morgan moved on April 20, 2006 to remand this action to state court because she had explicitly limited the damages sought to less than CAFA's $5,000,000 minimum amount in controversy. She argued that defendants could not meet their burden of demonstrating the propriety of this removal.

On August 7, 2006 this Court entered an order granting the motion to remand the action to New Jersey Superior Court. On August 16, 2006, Defendants obtained a stay from the District Court of the remand order in order to pursue an appeal to the Third Circuit. Though leave to appeal was granted, on December 15, 2006, the Third Circuit affirmed this Court's August 7, 2006 remand order.

Defendants next petitioned for panel rehearing, which petition was denied by the Third Circuit on February 2, 2007. Pet. App. C at 26a-27a. The Third Circuit issued its mandate seven calendar days later as Federal Rule of Appellate Procedure 41(b) requires, without Defendants having taken any intervening action to stay the Third Circuit's issuance thereof.

Three days *after* the issuance of the mandate, Defendants filed an Order to Show Cause with Temporary Restraints asking the District Court for a stay of the remand of the action. After briefing and argument of the Order to Show Cause, on February 27, 2007, the Defendants' application for a stay was denied. Resp. App. A.

The day after the denial of the stay, in accordance with 28 U.S.C. § 1447(c), the Clerk of the District Court transmitted a certified copy of the remand order, a certified copy of the docket sheet, the Order denying application for Order to Show Cause, the Mandate of the Third Circuit, and the Third Circuit's Opinion to the Clerk of the New Jersey Superior Court, Monmouth County. Resp. App. B.

Upon the New Jersey Superior Court's receipt of the District Court's February 28, 2007 letter, this case was immediately reinstated and is pending. Indeed, on March 20, 2007, Defendants formally appeared in the state court action, (Resp. App. C), and The Honorable Joseph P. Quinn, J.S.C. has scheduled a case management conference during June 2007.

Federal jurisdiction was extinguished when this action was remanded to state court several months ago without Petitioners having obtained a stay of the remand in order to pursue this petition for a writ of certiorari. Petitioners purport to invoke the Court's jurisdiction under 28 U.S.C. § 1254(1), but they simply have no basis for doing so.

REASONS FOR DENYING THE PETITION

Petitioners' assertion that the Third Circuit's "legal certainty" test: (1) is in conflict with this Court's decision in *St. Paul Mercury Co. v. Red Cab, Co.,* 303 U.S. 283 (1938); and (2) created a split of authority with other Courts of Appeals, is wrong on both counts.

No split of authority exists as to the legal standard to apply in determining the amount in controversy under

CAFA. The purported circuit split Petitioners identify is a fabrication. The Third Circuit's requirement that Petitioner bear the burden of demonstrating to a "legal certainty" that the claim must be worth more than the jurisdictional threshold is consistent with the prior holdings of this Court and of other courts of appeals, as well as with established principles of removal jurisdiction.

The Third Circuit's holdings do not thwart Congress' intent in passing CAFA, because Congress did not federalize all class actions – it expressly left to the state courts certain kinds of class actions, including those seeking $5 million or less in sum or value. Moreover, the Third Circuit's factual findings that Petitioners failed to meet their burden of demonstrating to a "legal certainty" that this case must be worth more that $5 million were correct; but in any event such questions do not present a compelling claim for this Court's review.

I. THE DECISION BELOW IS CONSISTENT WITH ESTABLISHED PRINCIPLES OF REMOVAL JURISDICTION AND THIS COURT'S PRIOR HOLDINGS

It is axiomatic that removal statutes are strictly construed with all doubts about the existence of removal jurisdiction to be resolved in favor of remand. *See, e.g., Sygenta Crop Protection Inc. v. Henson*, 537 U.S. 28, 32 (2002) ("Statutory procedures for removal are to be strictly construed."); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941) ("The policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of [the removal statute]."); 14C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 3739 at 446-51 (3d ed. 1998). The

strict construction is necessary because a defendant's use of the removal statute "deprives a state court of a case properly before it and implicates important federalism concerns." *Frank v. Bear Sterns & Co.*, 128 F.3d 919, 922 (5th Cir. 1997); *see also Lontz v. Tharp*, 413 F.3d 435, 440 (4th Cir. 2005).

Numerous courts have agreed with the principle that doubts are to be resolved in favor of remand. *E.g., Samuel-Bassett v. Kia Motors of America, Inc.*, 357 F.3d 392, 403 (3d Cir. 2004); *Acuna v. Brown & Root, Inc.*, 200 F.3d 335, 339 (5th Cir.), *cert. denied*, 530 U.S. 1229 (2000); *Coyne v. American Tobacco Co.*, 183 F.3d 488, 493 (6th Cir. 1999); *Duncan v. Stuetzel*, 76 F.3d 1480, 1485 (9th Cir. 1996). Nothing in CAFA altered this long standing legal principle. *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1328-1330 (11th Cir. 2006).

Petitioners' assertion that the Third Circuit's Opinion conflicts with this Court's decision in *Red Cab* is not correct. In fact, the Third Circuit *followed* this Court's decision in *Red Cab* when it recognized that, "[t]he Supreme Court has long held that plaintiffs may limit their claims to avoid federal subject matter jurisdiction." Pet. App. at 8a. The Third Circuit also quoted the *Red Cab* holding that: "[i]f [the plaintiff] does not desire to try his case in federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, *the defendant cannot remove*." *Red Cab*, 303 U.S. at 294 (emphasis added). Thus, the Third Circuit's holding below is consistent with *Red Cab*.

Moreover, nothing in *Red Cab* suggests that the Third Circuit should have adopted "preponderance of evidence" standard, the standard that Petitioners would prefer, rather than the well-settled "legal certainty" test it applied. Indeed *Red Cab* makes no mention whatsoever of a "preponderance of evidence" standard.

Petitioners' suggestion that in contravention of *Red Cab*, the Third Circuit "inexplicably flipped the burden . . . and placed it on the party seeking to *establish* federal jurisdiction," is misleading.[1] As the Third Circuit explained, prior to the passage of CAFA the burden of establishing jurisdiction had long been apportioned to the party seeking to remove the case to federal court. Pet. App. at 6a. *See, e.g., Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992) ("The party invoking federal jurisdiction bears the burden of establishing these elements."); *Boyer v. Snap-On Tools Corp.,* 913 F.2d 108, 111 (3d Cir. 1990).

As the Third Circuit and the District Court also recognized, every court of appeals to decide the question has held that CAFA did not shift the burden to the party seeking to keep the case in state court. *See* Pet. App. A at 6a-8a; Pet. App. B at 20a-21a. In addition to the Third Circuit below, the other courts of appeals to hold to date that under CAFA, the burden of proving jurisdiction remains on the proponent of federal jurisdiction include: *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1329-30 (11th Cir. 2006); *Abrego Abrego v. Dow Chemical Co.*, 443 F.3d 676 (9th Cir. 2006); *Blockbuster, Inc. v. Galeno,* 472 F.3d

[1] In *Burns v. Windsor Ins. Co.*, 31 F.3d 1092 (11th Cir. 1994), the Eleventh Circuit specifically rejected the argument Petitioners advance that as the party seeking jurisdiction, it should receive the benefit of *Red Cab's* legal certainty test. 31 F.3d at 1094-95.

53, 57-58 (2d Cir. 2006); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005); *see also Lowdermilk v. United States Bank Nat'l Ass'n*, 479 F.3d at 997 (9th Cir. 2007). Thus, Petitioners' argument that the Third Circuit erred or contradicted *Red Cab* by placing the burden on them to demonstrate that federal jurisdiction exists is, simply put, wrong.

In determining that the "legal certainty" test should apply, the Third Circuit did nothing new. It merely followed a long line of its prior holdings: *Samuel-Bassett v. Kia Motors America, Inc.*, 357 F.3d 392 (3d Cir. 2004); *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1044-46 (3d Cir. 1993); *Bloom v. Barry*, 755 F.2d 356, 358 (3d Cir. 1985); *Nelson v. Keefer*, 451 F.2d 289, 292-93 (3d Cir. 1971).

In *Samuel-Bassett*, a prior pronouncement of the "legal certainty" test to which the Third Circuit adhered below, the Third Circuit had carefully reconciled the Supreme Court's two decisions discussing the nature of a defendant's burden of proof in a removal case, namely, *Red Cab* and *McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. 178 (1936). The Third Circuit explained that in *McNutt*, "although a challenge to the amount in controversy had been raised in the pleadings, no evidence or findings in the trial court addressed that issue." 357 F.3d at 397. *McNutt* therefore appropriately held that where factual disputes over the amount in controversy were involved, application of a "preponderance of the evidence" standard to resolving those disputes would be appropriate. *Samuel-Bassett*, 357 F.3d at 398.

The Third Circuit also explained in *Samuel-Bassett* that in *Red Cab*, the plaintiff seeking remand had attempted to amend the complaint post-removal to allege damages less than the federal jurisdictional amount, but that the *Red Cab* Court held that the determination whether the requisite amount in controversy is present looks to the face of the pleadings to determine if it is apparent to a legal certainty that the plaintiff cannot recover the amount claimed. *Id.* Specifically, the Third Circuit reconciled the *McNutt* and *Red Cab* holdings as follows:

> In many cases, however, disputes over factual matters may be involved. In resolving those issues, the McNutt preponderance of the evidence standard would be appropriate. Once findings of fact have been made the court may determine whether Red Cab's legal certainty test for jurisdiction has been met.

Id. [internal footnotes omitted].

The Third Circuit in *Samuel-Bassett* "recommend[ed] that when the relevant facts are not in dispute or findings have been made, the District Courts adhere to the 'legal certainty' test cited in such cases as *Packard,* 994 F.2d 1039; *Bloom v. Barry,* 755 F.2d 356 (3d Cir. 1985); and *Nelson v. Keefer*, 451 F.2d 289 (3d Cir. 1971)." *Id.*

Thus, the Third Circuit's decision below did not conflict with *Red Cab* or with any other decisions of this Court.[2]

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[2] *See also Wetmore v. Ryan*, 169 U.S. 115, 128 (1898) (stating that a lawsuit could not properly be dismissed for failing to satisfy the amount in controversy requirement unless the facts appearing on the record

(Continued on following page)

II. THE PURPORTED SPLIT OF AUTHORITY ON THE STANDARD FOR DETERMINING WHETHER THE REMOVING PARTY HAS DEMONSTRATED THAT THE STATUTORY MINIMUM AMOUNT IN CONTROVERSY IS PRESENT, DOES NOT EXIST

Petitioners' attempt to portray the Third Circuit's decision as *creating* a split of authority on the issue of the proper standard to be applied in determining if the jurisdictional minimum is present, is pure sophistry. They claim that all earlier court of appeals decisions have adopted a "preponderance of evidence" standard, Pet. at 13-14, but, in fact, no such split among courts of appeals was created by the Third Circuit's decision.

As discussed above, the Third Circuit's decision merely followed a long line of earlier Third Circuit precedent, including *Nelson v. Keefer, supra*, a case more than 35 years old, requiring adherence to the "legal certainty" standard. In an effort to fabricate a split of authority created by the Third Circuit's decision below, Petitioners completely ignored these decisions, including *Samuel-Bassett*, binding precedent discussed by the Third Circuit in its Opinion below, that applied the "legal certainty" test and rejected the "reasonable probability" test for assessing if the proponent of federal jurisdiction had carried its burden of demonstrating that the minimum amount in controversy is present. *Samuel-Bassett*, 357 F.3d at 396-398.

In this regard, the *Samuel-Bassett* court held that: "despite the use by some courts of such phrases as "more

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create a legal certainty of the conclusion that the threshold has not been met).

likely than not," "substantial likelihood," and "reasonable probability," we recommend that when the relevant facts are not in dispute or findings have been made, the District Courts adhere to the 'legal certainty' test" adopted in its prior holdings in, for example, *Packard,* 994 F.2d 1039; *Bloom v. Barry,* 755 F.2d 356 (3d Cir. 1985); and *Nelson v. Keefer*, 451 F.2d 289 (3d Cir. 1971). *Id.* at 398.

The Ninth Circuit in *Lowdermilk* recently agreed with the Third Circuit below and also rejected the "preponderance of evidence" test where a plaintiff pleads a specific damages amount less than the jurisdictional threshold. 479 F.3d at 998. The Ninth Circuit found that in that scenario, it is usually unnecessary to look beyond the four corners of the complaint absent evidence of bad faith pleading. *Id.* To avoid remand, a defendant must contradict plaintiff's assessment of damages and overcome the presumption against federal jurisdiction by producing proof to a "legal certainty." 479 F.3d at 998-99.

Thirteen years ago, in *Burns v. Windsor Ins. Co.*, 31 F.3d 1092 (11th Cir. 1994), a case on all fours with this one, the Eleventh Circuit rejected the "preponderance of evidence" standard because in all the cases adopting such a standard the amount of damages sought by plaintiff was unspecified, and applied the "legal certainty" test to a defendant's attempt to show that plaintiff's specific limitation of damages to $5,000 below the jurisdictional minimum was illusory and designed to defeat federal subject matter jurisdiction 31 F.3d 1095-97.

In light of the consistent earlier holdings of the Third Circuit, including *Samuel-Bassett*, as well as the Eleventh Circuit's decision in *Burns,* Petitioners' attempt to characterize the Third Circuit's decision as creating a split of

authority can be summarily rejected. The Ninth Circuit's *Lowdermilk* decision merely reinforces this.

As to Petitioners' specific attempt to show a split of authority, on page 14 of the Petition, Petitioners cite to a string of decisions, most pre- and a few post-CAFA, in which other courts of appeals presented with different factual scenarios have found that the defendant seeking removal must prove by a "preponderance of the evidence" that the amount in controversy requirement is met, and argue that the Third Circuit's decision created a conflict with them. It did not.

Even a cursory look at the holdings of the cases Petitioners cite make clear that it is necessary to differentiate between the cases depending on the scenario presented. Courts have distinguished between cases where, (1) as here, plaintiff has pled a binding, specific amount of damages below the jurisdictional threshold and not attempted to amend that amount post-removal; (2) the plaintiff has pled an indeterminate amount or the facts as to the amount of damages sought is disputed; and, (3) the plaintiff has alleged damages in excess of the amount in controversy. The need to make these distinctions because of their impact on the proper standard of review to be applied, has been recognized not only by the most recent court of appeals decision in this area but also by courts and commentators writing more than a decade ago. *See, e.g., Lowdermilk,* 479 F.3d at 998; *Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 156-58 (6th Cir. 1993) (providing a review of the tests adopted by the courts in the various scenarios); A. M. Noble-Allgire, *Removal of Diversity Actions When the Amount in Controversy Cannot be Determined From the Face of Plaintiff's Complaint: The Need For Judicial and Statutory Reform to Preserve*

Defendant's Equal Access to Federal Courts, 62 Mo. L. Rev. 681 (1997) (defining the various scenarios, citing cases, and advocating in 1997 for the adoption of a uniform "legal certainty" test in order to foster consistency with this Court's precedent).

A few of the cases Petitioners cite expressly recognize the *Red Cab* holding, which the Third Circuit relied upon, that a plaintiff is the master of his or her complaint and may permissibly plead below the jurisdictional minimum to avoid removal, and thus cannot fairly be said to conflict with the Third Circuit's Opinion below. *See Oshana v. Coca-Cola,* 472 F.3d 506, 511 (7th Cir. 2006); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 449 (7th Cir. 2005); *Gafford v. General Elec. Co.*, 997 F.2d 150, 157-58 (6th Cir. 1993).

In *Oshana*, for example, a pre-CAFA case, the plaintiff pled an amount in controversy below the $75,000 threshold but later refused to admit she would not seek damages in excess of that amount, which worked against her. 472 F.3d at 512. The *Oshana* court, relying on *Red Cab*, recognized that "if *Oshana* really wanted to prevent removal, she should have stipulated to damages not exceeding the $75,000 jurisdictional limit." *Id.* at 511. Because she refused to continue to limit her damages, the court was forced to treat the case as one requesting an indeterminate amount of damages and applied a "preponderance of evidence" standard to the defendant's evidence that the claim had to be worth more than $75,000.

Likewise, in *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005), the plaintiff's complaint was silent as to the amount in controversy, unlike plaintiff in this case. 427 F.3d at 449. The court required the removing

party to show the stakes of the litigation to a "reasonable probability." *Id.* However, in doing so, the *Brill* court specifically recognized that the plaintiff could have capped recovery by representing that the class would neither seek nor accept more than $5 million to keep the amount in controversy below the threshold. *Id.*

The majority of the cases Petitioners cited are cases where, unlike the present circumstances, the complaints were either silent as to the amount of damages sought, the amount was indeterminate, or disputes over factual matters concerning the amount in controversy were involved. For example, in *Miedema v. Maytag Corp.*, 450 F.3d 1322 (11th Cir. 2006), the plaintiff did not plead a specific amount of damages at all. 450 F.3d at 1324-25. Only because of that, the Eleventh Circuit affirmed the district court's application of a "preponderance of evidence" standard to the evidence put forward by the proponent of federal jurisdiction that the amount in controversy actually exceeded the CAFA minimum. 450 F.3d at 1330. The *Miedema* court stated: "'[w]here, as here, the plaintiff has not pled a specific amount of damages, the removing defendant must prove by a preponderance of evidence that the amount in controversy exceeds the jurisdictional requirement.'" *Id.*, *quoting*, *Williams v. Best Buy Co., Inc.*, 269 F.3d 1316, 1319 (11th Cir. 2001).

In *Tropp v. Western-Southern Life Ins. Co.*, 381 F.3d 591 (7th Cir. 2004) the Seventh Circuit applied a "reasonable probability" test to the question whether the defendant had offered sufficient evidence to show that the requisite amount in controversy existed, where the plaintiff had not specified an amount in controversy. 381 F.3d at 595. *Accord Smith v. American General Life and Accident Ins. Co.*, 337 F.3d 888 (7th Cir. 2003) (applying a

preponderance of evidence standard to assessment of removing defendant's proof that the $75,000 minimum amount in controversy was present where the elements necessary to determine the amount in controversy were unspecified); *McCord v. Minnesota Mut. Life Ins. Co.*, 346 F.3d 830 (8th Cir. 2003) (applying a preponderance standard where the complaint alleged no specific amount of damage); *White v. FCI USA, Inc.*, 319 F.3d 672, 675 (5th Cir. 2003)) (same); *Grant v. Chevron Phillips Chem. Co., L.P.*, 309 F.3d 864 (5th Cir. 2002) (applying a preponderance standard where plaintiff was prohibited by state law from alleging a specific damages amount in the complaint), *cert. denied*, 538 U.S. 945 (2003); *Hayes v. Equitable Energy Res. Co.*, 266 F.3d 560 (6th Cir. 2001) (requiring a showing by a preponderance of evidence where a complaint sought unspecified damages).

It can readily be seen that Petitioners suggestion that the Third Circuit's Opinion below applying a "legal certainty" test created a split of authority with other courts of appeals that have applied a "preponderance of evidence" test to the issue of the proper standard of review of the evidence of the amount in controversy, is inaccurate. As no split of authority exists and as the decision below is consistent with this Court's prior holdings, earlier Third Circuit precedent, and fundamental principles of removal jurisdiction, no compelling reason exists for the acceptance of this Petition for a writ of certiorari.

III. THE THIRD CIRCUIT'S FACTUAL FINDINGS WERE CORRECT AND, IN ANY EVENT, DO NOT PRESENT A COMPELLING CASE FOR REVIEW

The Third Circuit's factual findings that Petitioners failed to meet their burden of demonstrating a sufficient

amount in controversy for federal jurisdiction was correct under settled law, and, in any event, do not present a compelling case for review on a writ of certiorari. *See* Sup. Ct. Rule 10.

The Third Circuit found that Petitioners failed to demonstrate to a legal certainty that Respondent Morgan's damages limitation was made in bad faith because: (1) they did not specify the kind of punitive damages exposure that existed in the circumstances; (2) they failed to provide any information about how much profit from New Jersey sales of StriVectin-SD was available for disgorgement; (3) they failed to provide any statistical information regarding the amount of StriVectin-SD sold in New Jersey; and (4) they failed to provide the evidence of the actual price paid by the class members for the product.[3] Pet. App. A at 10a-12a.

As to Petitioners' claim that the Third Circuit disregarded the true value of the case by neglecting to value disgorgement, attorneys' fees and punitive damages, the courts below explained that Petitioners failed to provide factual support for their assertion that the value of the case must far exceed $5 million, in contrast with Respondent's tangible, straight-forward pleading stating that the

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[3] Petitioners' suggestion that the Third Circuit improperly permitted Respondent to amend her damages limitation post-removal, is a red herring. There simply was no post-removal amendment, affidavit or stipulation advanced by Respondent or her counsel for the purpose of reducing the amount sought. There was no need for any such thing because Respondent's complaint clearly and validly limited the damages sought to less than $5 million in sum or value. Based on case law and Respondent's damages limitation, the Third Circuit agreed that the disgorgement sought could only apply to profits earned from sales to class members. Pet. App. A at 11a.

financial award sought does not exceed $5 million. These factual findings are ill-suited to the Court's review.

Petitioners' argument that the value of injunctive relief was not included in the assessment of what Respondent Morgan sought in damages must be rejected for two reasons. First, this argument was not advanced in the Third Circuit (or in the District Court for that matter), and as such Petitioners waived any opportunity to raise the issue on this Petition. Second, as with all the other elements of Respondent's damages claim, Petitioners never advanced any evidence of the cost of an injunction, thus the courts below would have been compelled by Petitioners' failure to do so to conclude as they did with respect to other damages elements, that Petitioners had failed to meet their burden of demonstrating that the case actually must be worth more than $5 million.

Petitioners also attempt to mislead the Court by suggesting that the Third Circuit erred in rejecting jurisdiction over this case where it had found that the case "in all likelihood" could meet the minimum amount in controversy. Pet. at 12. The Third Circuit made no such finding. In suggesting that it did, Petitioners deliberately take out of context, the Third Circuit's statement that:

> [i]f this court had all the information available to make [] a determination [whether plaintiff's actual monetary demands in the aggregate exceed the threshold, irrespective of whether the plaintiff states that the demands do or not], our conclusion here might be that the plaintiff's claim in all likelihood exceed $5 million.

Pet. App. A at 10a.

No fair reading of the foregoing passage would conclude that the Third Circuit stated that the case "in all likelihood" must be worth more than $5 million. Rather, what the Third Circuit was saying is simply that Petitioners failed to meet their burden of demonstrating with "legal certainty" that the case is necessarily worth $5 million because they failed to provide the Court with the necessary information with which to decide in their favor. In light of these findings Petitioners' suggestion that the Third Circuit erred in depriving them of the federal forum to which they are entitled under CAFA, ring hollow.

IV. ALTERNATIVE GROUND

This Court has no jurisdiction to hear this appeal where the action has already been remanded and is pending in state court.

As discussed in detail above, the Third Circuit issued the mandate in this action on February 12, 2007, thereby transferring back to the District Court the jurisdiction of the Court of Appeals over this action. *E.g., Bliss v. Lockhart*, No. 90-2144, 1990 U.S. App. LEXIS 23152, *2 (8th Cir. Dec. 26, 1990) ("The effect of the mandate is to transfer jurisdiction from the court of appeals to the district court from which the case originated"); *United States v. Rivera*, 844 F.2d 916, 920-921 (2d Cir. 1988) ("Simply put, jurisdiction follows the mandate); *Ostrer v. United States,* 584 F.2d 594, 598 (2d Cir. 1978) ("The effect of the mandate is to bring the proceedings in a case on appeal in our Court to a close and remove it from the jurisdiction of this Court, returning it to the forum whence it came."); *Lashley v. Artuz*, No. 01 Civ. 11542 (SAS), 2004 U.S. Dist. LEXIS 9707, *3-4 (S.D.N.Y. May 27, 2004) (jurisdiction follows the

mandate); *United States v. Russo,* 550 F. Supp. 1315, 1318 (D.N.J. 1982), *aff'd without op.,* 722 F.2d 736 (3d Cir. 1983), *cert. denied,* 464 U.S. 1045 (1984) (circuit court retains jurisdiction over case until mandate has issued).

Defendants inexplicably failed to comply with the provisions Federal Rule of Appellate Procedure 41(d)(2)(A) regarding seeking a stay of the mandate pending filing a petition for a writ of certiorari. However, Defendants knew they needed a stay of the execution of the remand order because they sought one from the District Court. On February 15, 2007, Defendants filed an emergency Order to Show Cause with Temporary Restraints with the District Court seeking a stay of the transmittal of the case back to state court, pending their filing of a petition for certiorari. The stay application was flatly denied on February 27, 2007. Resp. App. A at App. 1 – App. 2.

The following day, the Clerk of the District Court transmitted a certified copy of the remand order and other relevant documents to the Clerk of the New Jersey Superior Court, as 28 U.S.C. § 1447(c) requires, (Resp. App. B at App. 3 – App. 4), thereby extinguishing any remnant of federal jurisdiction over the action. As the removal statute expressly provides, once "[a] certified copy of the order of remand [is] mailed by the clerk to the clerk of the state court . . . the State court may thereupon proceed with such case." 28 U.S.C. § 1447(c).

Defendants' Petition, claims jurisdiction in this Court under 28 U.S.C. § 1254. Yet that provision, on its face, allows for review only of "[c]ases *in* the courts of appeals . . . ," not of cases pending in state court. *Id.* (emphasis added). Here, there simply is no longer a "case[] in the court[] of appeals to be reviewed by the Supreme Court"

by petition for writ of certiorari as 28 U.S.C. § 1254 requires. Nor is there even a case in a United States district court from which Defendants can seek this review. The case was transmitted to and is pending in state court. Resp. App. C at App. 5 – App. 6.

Although a few very old cases suggest that in certain circumstances the issuance of the mandate does not defeat this Court's jurisdiction, *e.g.*, *Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 466-67 (1947), not one of those cases suggest this Court may exercise jurisdiction over an action even after the district court has remanded it and it is pending in state court, such that there is nothing in any federal court from which to appeal.

For this additional reason, summary denial of the Petition for want of jurisdiction is warranted.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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JILL C. OWENS
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Counsel of Record

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

SARAH MORGAN,	:	
Plaintiff,	:	Civ No 06-1371 (GEB)
v	:	**ORDER**
DENNIS W. GAY, ET AL	:	(Filed Feb. 27, 2007)
Defendants	:	

BROWN, Chief Judge

This matter having come before the Court upon the Application for an Order to Show Cause With Temporary Restraints Staying Remand to State Court Pending Petition for Certiorari of Defendants Dennis W Gay, Gina Gay, Basic Research, L.L.C., Ban, L.L.C., Klein-Becker, USA, L.L.C., Covaxil Labs, L.L.C., Carter-Reed Co, L.L.C., A.G. Waterhouse, L.L.C., Alphagenbo Tech, L.L.C., Body Forum, L.L.C., Body Innoventions, L.L.C., Covarix, L.L.C., Bydex Management, L.L.C., Nutrasport, L.L.C., Sovage Dermalogic Laboratories, L.L.C., Western Holdings, L.L.C., George Evan Bybee, Daniel B. Mowrey, Nathalie Chevreau, Mitchell K. Friedlander and Michael Meade (collectively, "Defendants"); and the Court having fully reviewed all documents filed and submitted; and for the reasons set forth during the February 27, 2007 telephone hearing with the parties;

IT IS THIS 27th day of February, 2007

ORDERED that the Defendants' Application is DENIED.

s/ Garrett E. Brown, Jr.
GARRETT E BROWN, JR., U.S.D.J.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

OFFICE OF THE CLERK

Martin Luther King Jr. Federal Bldg & U.S. Courthouse
50 Walnut Street, P.O. BOX 419
Newark, N.J. 07101

CAMDEN OFFICE
Mitchell H. Cohen U.S. Courthouse
One John F. Gerry Plaza
Fourth & Cooper Streets Room 1050
Camden, N.J. 08101

TRENTON OFFICE
Clarkson S. Fisher U.S. Courthouse
402 East State Street Room 2020
Trenton, N.J. 08608

[LOGO]
William T. Walsh
Clerk

Reply To: ***TRENTON***

February 28th 2007

NJ Superior Court, Law Division
Monmouth County Courthouse
71 Monument Park
P.O. Box 1266
Freehold, NJ 07728-1266

RE: Morgan v. Gay, et al.
06-1371(GEB)

Dear Clerk,

Pursuant to the order of remand entered in the above entitled matter by this Court, please find the following documents enclosed:

- Certified copy of the order remanding the action
- Certified copy of the docket sheet
- Order denying application for Order to Show Cause
- Order granting Motion for Stay
- Mandate of USCA as to Notice of Appeal
- Opinion

Sincerely,

William T. Walsh, Clerk

/s/ David A. Hartnett
BY David A. Hartnett
Deputy Clerk

APPENDIX C

HOWREY LLP

Citigroup Center
153 E. 53rd Street, 54th Floor
New York, New York 10022

Attorneys for Defendants

SARAH MORGAN, et al., on behalf of themselves and all others similarly situated, Plaintiffs, v. DENNIS W. GAY, GINA GAY, BASIC RESEARCH, L.L.C., BAN, L.L.C., KLEIN-BECKER, USA, L.L.C., COVAXIL LABORATORIES, L.L.C., CARTER-REED COMPANY, L.L.C., a/k/a THE CARTER REED COMPANY, A.G. WATERHOUSE, L.L.C., ALPHAGENBO TECH, L.L.C., BODY FORUM, L.L.C., BODY INNOVENTIONS, L.L.C., COVARIX, L.L.C., BYDEX MANAGEMENT, L.L.C., NUTRASPORT, L.L.C., SÖVAGE DERMALOGIC LABORATORIES, L.L.C., WESTERN HOLDINGS, L.L.C., GEORGE EVAN BYBEE, DANIEL B. MOWREY, PhD, NATHALIE CHEVREAU, PhD, MITCHELL K. FRIEDLANDER, and MICHAEL MEADE, Defendants.	SUPERIOR COURT OF NEW JERSEY MONMOUTH COUNTY, LAW DIVISION DOCKET NO. MON-L-556-06 **CIVIL ACTION** **NOTICE OF APPEARANCE**

PLEASE TAKE NOTICE that the undersigned shall hereby appear as counsel for Defendants in conjunction with Mr. James G. McCarney, Esq. whose notice of appearance was previously filed with the Court in this action. Ms. Sarchio and Mr. McCarney, jointly request that all papers served or filed in this action be directed to: Mr. James G. McCarney, Esq., Citigroup Center, 153 E. 53rd Street, 54th Floor, New York, New York 10022.

Dated: March 20, 2007
Washington, DC

/s/ Christina Sarchio
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N.J. Bar No. 02373-1995
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Attorney for Defendants
Carter-Reed Company, L.L.C., a/k/a The Carter Reed Company, Basic Research, L.L.C., DG Enterprises, Inc., Alphagenbo Tech, L.L.C., Body Forum, L.L.C., Body Innoventions, L.L.C., Covarix, L.L.C., Covaxil Laboratories, L.L.C., Bydex Management L.L.C., Western Holdings, L.L.C., Dennis W. Gay, and Natalie Chevereau

APPENDIX D

28 U.S.C. § 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter

jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.